

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

NATIONWIDE MUTUAL INSURANCE)
COMPANY a/s/o Vilma Isaac and Lourdes)
Bulanhagui,)

Plaintiff,)

v.)

C.A. No.: 2003-06-020

RELIANT AMERICAN INSURANCE)
COMPANY, JAMES VANN, and WILLIE)
VANN,)

Defendants.)

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I. ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1. This subrogation action arises from a motor vehicle accident that occurred on or about May 19, 2000 wherein a truck insured by defendant Reliant American Insurance Company ("defendant") collided into a 1998 Ford Taurus¹ insured by plaintiff Nationwide Mutual Insurance ("plaintiff"). At the time of the accident, James R. Vann was the driver of the truck, which was owned by Willie E. Vann, Willie E. Vann and Sons Inc., and Vann Trucking Company ("defendant's subrogees"). Vilma Isaac and Lourdes Bulanhagui, ("plaintiff's subrogees"), were the occupants in the 1998 Ford Taurus and both sustained serious bodily injuries. Towards the end of 2001 plaintiff made personal injury protection ("PIP") payments for medical expenses to plaintiff's

¹ Roberto Sumiland, not a party to this action, owned the 1998 Ford Taurus.

subrogees in the amount \$22,390.28, of which \$9,362.10 was paid to Vilma Isaac and \$13,028.18 was paid to Lourdes Bulanhagui. From late 2001 to mid-2003, plaintiff mailed five letters to defendant seeking reimbursement of the entire amount of \$22,390.28.

2. On February 3, 2003 plaintiff's subrogees each executed a General Release and Settlement Agreement (the "Release Agreement"), where the terms state that defendant and defendant's subrogees all seek to be discharged,

"...of and from any and all past, present, or future claims, demands, obligations, actions, causes of action, liens, rights, damages, costs, expenses and compensation of any nature whatsoever, whether based on a tort, contract or other theory of recovery, and whether for compensatory or punitive damages, which the Plaintiff now has, or which may hereafter accrue or otherwise be acquired, on account of, or in any way growing out of, or which are the subject of the Lawsuit (and all related pleadings) including, without limitation, any and all known or unknown claims for bodily and personal injuries to Plaintiff, and the consequences thereof, which have resulted or may result from the alleged negligent or intentional acts or omissions of the Defendants. This Release, on the part of the Plaintiff, shall be a fully binding and complete settlement between the Plaintiff, the Defendants and all parties represented by or claiming through the plaintiff save only the executory provisions of this Release and Settlement Agreement."

3. In exchange for being discharged of the above-listed claims, Vilma Isaac's Release Agreement sets forth that she received \$7,500.00, and similarly, Lourdes Bulanhagui's Release Agreement sets forth that she received \$32,500.00, as "a full, complete, and final settlement" of all claims arising out of the accident. Each of plaintiff's subrogees signed a Release Agreement, and each Release Agreement also bears the signatures of one witness and one notary.

4. On June 3, 2003 plaintiff filed its Complaint in this Court, alleging that per the Delaware statute, Nationwide "is subrogated to the legal rights of its insureds,

Vilma Isaac and Lourdes Bulanhagui, arising from the aforesaid Delaware motor vehicle accident and to the extent of the motor vehicle insurance benefits that were paid by Plaintiff Nationwide Mutual Insurance Company to Vilma Isaac and Lourdes Bulanhagui and/or on their behalf.” Nationwide also alleges that at the time of the accident, defendant’s subrogee James Vann was operating the truck as an agent of Willie Vann and Vann Trucking Company, also subrogees of defendant. Defendant Reliant’s July 31, 2003 Answer denies the alleged agency relationship. Reliant also asserts as a Fourth Affirmative Defense that plaintiffs’ claims should be barred or that recovery should be reduced “to the extent that plaintiffs’ subrogees have waived or released claims against defendants.”

5. On or about March 9, 2006, defendant Reliant filed a Motion for Summary Judgment pursuant to Rule 56 of the Civil Rules Governing the Court of Common Pleas (the “Motion”). Defendant argues that by signing the Release Agreements plaintiff’s subrogated right to litigate and/or seek reimbursement from defendant was cut-off, to the extent of the \$22,390.28 in PIP payments. Defendant further alleges that although plaintiff’s subrogation rights are statutory in nature pursuant to 21 *Del. C.* § 2118(f), that these rights are nevertheless derivative of plaintiff’s subrogees. In support of this, defendant cites the Delaware Supreme Court’s language in *Great American Insurance Co. v. Fisher Controls, et. al.*, “[A] bedrock principle of subrogation is that the ‘insurer who subrogates himself to his insured stands in the shoes of this insured and can take nothing by subrogation but the rights of the insured.’” 2003 Del.Super. LEXIS 275, *18.

6. Defendant additionally cites a decision rendered by the Delaware Court of Chancery to stand for the over-arching proposition that a general release “extinguishes all

claims, regardless of origin, owned by the released party to the releasor. *See Corp. Prop. Assocs v. Hallwood Group Inc.*, 792 A.2d 993, 1007 (Del.Ch.2002).” Defendant’s Motion concludes by suggesting that plaintiffs are litigating against the wrong party, and that instead “Nationwide’s proper focus should be on its own insureds.” Finally, defendant argues having no notice of plaintiff’s subrogated status.

7. In response, plaintiff responds by arguing that defendant has ignored the legislative intent as well as the plain and unambiguous statutory language of 21 *Del. C.* § 2118. Plaintiff asserts that 21 *Del. C.* § 2118 along with the Delaware Supreme Court’s opinion in *Harper v. State Farm Mutual Auto. Ins. Co.* provides the distinction between rights that are statutorily derived versus rights derived from the common law. 703 A.2d 136 (Del.Supr.1997). Plaintiff further noted two Superior Court cases, *Prudential Property and Casualty Ins. Co. v. Melvin*, 2001 Del. Super. LEXIS 157, and *State Farm v. Dann*, C.A. No. 00A-09-004-JRJ (Del.Super.2002). Additionally, plaintiff attached to its Response several letters from plaintiff to defendant regarding the PIP claim.

II. MOTION FOR SUMMARY JUDGMENT STANDARD

A motion for summary judgment is granted where there “is no genuine issue as to any material fact.” *Van Dyke v. Pennsylvania R.R.*, 86 A.2d 346, 349 (Del.Supr.1952); *Behringer v. William Gretz Brewing Co.*, 169 A.2d 249, 251 (Del.Supr.1961); *Matas v. Green*, 171 A.2d 916, 918 (Del.Supr.1961). A Motion for Summary Judgment must be denied when evidence indicates that “there is reasonable indication that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law.” *Ebersole v. Lowengrub*, 180 A.2d 467, 468-469 (Del.Supr.1962) *rev'd in part and aff'd in part*, 208 A.2d 495 (1965); *Myers v. Nicholson*,

192 A.2d 448, 451 (Del.Supr.1963); *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del.Super.1995); *Smith v. Berwin Bldrs., Inc.*, 287 A.2d 693 (Del.Super.1972). Further, the court is required to view the facts in a light most favorable to the non-moving party. *Matas*, 171 A.2d at 918; *James v. Getty Oil Co. (E.Operations), Inc.*, 472 A.2d 33, 38 (Del.Super.1983); *Borish v. Graham*, 655 A.2d 831, 833 (Del.Super.1994); *Shultz v. Delaware Trust Co.*, 360 A.2d 576, 578 (Del.Super.1976); *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334, 335 (Del.Super.1973).

III. THE LAW

Within Delaware's subrogation statute, 21 *Del. C.* § 2118, subsection (g)(2) provides, "Any settlement made with an injured party by a liability insurer shall not be challenged or disputed by any insurer having subrogated rights." Although controlling case law in Delaware discussing the issue of the rights of a subrogated party when a release agreement has been signed by its subrogee is sparse at best, other states have reconciled the interplay between release agreements and subrogation:

(i) "Generally, if insured settles with or in any way releases a third-party tort-feasor who is responsible for the loss, and who is without actual or constructive notice of the rights of the insurance company, the latter's right to acquire subrogation against the tort-feasor is destroyed, and this rule applies where the settlement or release occurs before the insurance company has made any payment under the policy."

"..."

* * *

(ii) However, a release given by insured does not destroy the insurance company's right to subrogation where the tort-feasor or his insurance company had knowledge or notice of the insurance company's interest prior to the release. Otherwise stated, if the tort-feasor is chargeable with notice of the rights of the insurance company and enters into a settlement with insured to which the insurance company is not a party, the settlement

may be regarded as having been made subject to the rights of the company. An express reservation in the release of the insurance company's rights constitutes notice to, and indicates knowledge by, the tort-feasor that the insurance company intends to proceed against him and thus preserves the insurance company's subrogation rights.

In order for an injured party's insurance company to make a successful claim after the tort-feasor's insurance company has settled with the injured party, the tort-feasor's insurance company must be on notice that the injured party's rights have been subrogated. The notice of the subrogation claim must be specific in order to place the tort-feasor's insurance company on notice of the specific claim; a general nonspecific subrogation claim cannot place the tort-feasor's insurance company on notice for any specific type of a subrogation claim.

* * *

(iii) A settlement entered into by insured with the tort-feasor would have no effect where the subrogated insurance company is erroneously denied the right to assert its part of the claim against the tort-feasor, or where the insurance company has contractual and equitable rights which could not be compromised or released without its participation, either expressly or constructively. Also, an insurance company's rights to subrogation may be preserved in the absence of any language in an agreement or release either between the insurance company and insured or between insured and the tort-feasor that could be construed as barring such a claim. It has been held that when the tort-feasor's insurance company and the injured party enter into a settlement which neither involves the subrogated insurance company as a party to the settlement nor provides for the payment of its interest, the tort-feasor fails to satisfy the part of the claim owned by the subrogated insurance company.

Where insured and the tort-feasor enter into a settlement agreement in good faith, subject to insured's obtaining a release from his insurance company to which insured has given a subrogation agreement, and where this proposed settlement, in addition to the insurance proceeds, will not reimburse insured for his entire loss, the settlement may not be consummated without further liability by either insured or the tort-feasor to the insurance company.

* * *

(iv) Settlement after payment.

The insurance company's right of subrogation is not destroyed when insured settles with the tort-feasor after receiving payment from the insurance company if the tort-feasor had actual or constructive knowledge of the payment and the right of subrogation, but this rule may not apply where the tort-feasor does not pay the loss voluntarily, but is compelled to do so, as by a judgment against him for the loss. On the other hand, the insurance company's right of subrogation is destroyed when insured settles with the tort-feasor after receiving payment from the insurance company, if the tort-feasor had no notice or knowledge of the payment or of the insurance company's subrogation claim. It has been held that between an insurance company acquiring a claim by subrogation which fails to notify the tort-feasor thereof, and a tort-feasor failing to inquire as to the existence of insurance coverage, the loss should fall upon the former.”

“...”

“[Notice]

(v) In order for an injured party’s insurance company to make a successful claim after the tort-feasor’s insurance company has settled with the injured party, the tort-feasor’s insurance company must be on notice that the injured party’s rights have been subrogated. The notice of the subrogation claim must be *specific* in order to place the tort-feasor’s insurance company on notice of the specific claim; a general nonspecific subrogation claim cannot place the tort-feasor’s insurance company on notice for any specific type of a subrogation claim.”

See: Corpus Juris Secundum, Insurance: XXIII. Subrogation of Insurance Company; Recovery of Payments. 46A C.J.S. Insurance § 1472. (Internal citations omitted); (Emphasis added).

IV. DISCUSSION.

Turning to the relevant case law surrounding Delaware’s subrogation statute, in *Harper* the Delaware Supreme Court reversed and remanded a decision of the Superior Court to dismiss insured appellant Delores Harper’s action to recover PIP payments as time-barred by the then-applicable two year statute of limitations period set forth in 10

Del. C. § 8119. After analyzing the legislative intent underlying 21 *Del. C. § 2118*, the Court in *Harper* held,

“the PIP carrier’s right of subrogation is a statutorily created cause of action. We have also held that the applicable statute of limitations for that cause of action is the three-year provision in 10 *Del. C. § 8106*. We further hold that a cause of action for the PIP insurer’s statutory right of subrogation, against the tortfeasor’s liability insurer, does not accrue until the PIP benefit is paid to or for its insured. *See Chesapeake Utils. Corp. v. Chesapeake & Potomac Tel. Co.*, Del.Super., 401 A.2d 101, 102 (1979).” *Id.* at 141.

In 1999, the Superior Court in *Prudential Ins. Co. v. Karen Melvin and State Farm Mutual Ins. Co.* weighed the facts surrounding *Chesapeake* against the analysis in *Harper* to determine the meaning of the phrase, “until the PIP benefit is paid to or for its insured.” 2001 WL 491229, at [*4] (Del.Super. Apr 30, 2001). The Superior Court found the language in *Harper* to indicate “the accrual date [for the PIP insurer’s statutory right of subrogation against the tortfeasor’s liability insurer] as the date all PIP payments have become fixed, discharged, and paid to the insured.” *Id.* Turning to the facts of the case at bar, the Court must first determine the date the PIP payments became fixed, discharged, and paid by plaintiff to its subrogees, and second, determine if defendants possessed specific notice of plaintiff’s status as a subrogor of its subrogees personal injury claim.

V. ANALYSIS

Based on the record before this Court, it appears that plaintiff considered the PIP payments fixed, discharged, and/or paid at some point after October 24, 2000, but on or before November 8, 2001. Tab 5 attached to plaintiff’s April 12, 2006 Response and Opposition to Defendant’s Motion for Summary Judgment shows a series of letters from plaintiff to defendant. The first letter, dated October 24, 2000, requested \$4,189.26 in reimbursement from defendant for the damage to the 1998 Ford Taurus. This letter reads,

“PIP IS PENDING; CURRENTLY \$14,523.86.” The next document is a photocopy of a check dated November 10, 2000 from defendant to plaintiff for the requested amount of \$4,189.26 for damage to the 1998 Ford Taurus. The third document is a letter, dated November 8, 2001, and reads, “\$9,362.10 (PIP FOR VILMA ISAAC)” and “\$13,028.18 (PIP FOR LOURDES BULANHAGUI)” and then states, “Total \$22390.28 (PIP SUPPORTS ATTACHED).”

The next four letters from plaintiff to defendant, the final one on May 5, 2003, all bear the same total amount for the PIP claim, \$22,390.28. Thus, it appears that the amount became fixed, discharged, and/or paid to plaintiff’s subrogees on or before November 8, 2001 since that amount has not changed in any of the letters thereafter from plaintiff to defendant, however the Court is unable to ascertain, from the record, the exact date plaintiff made the PIP payments to its subrogees. The Release Agreements were signed on February 3, 2003, approximately more than one and a half years after the PIP claim amount became fixed.

The final analysis must now turn to whether or not defendant had knowledge or notice of plaintiff’s subrogation interest prior to February 3, 2003, and if so, what *type* of notice. As mentioned above, plaintiff’s letter to defendant dated October 24, 2000 requesting payment for damage to the 1998 Ford Taurus was paid by a check from defendant to plaintiff dated November 10, 2000. The October 24, 2000 letter states that the PIP amount is pending but that it had, as of that date, reached \$14,523.86. Based on the evidence, it appears that defendant possessed the requisite specific notice of plaintiff’s subrogation claim, however this is nonetheless disputed in defendant’s Motion.

VI. CONCLUSION AND ORDER

This Court has considered the interpretations of the holdings of *Harper*, *Chesapeake*, and *Prudential* along with the above-mentioned body of law surrounding Release Agreements, and the legislative intent behind Delaware's subrogation laws. The issue of defendant's factual notice of plaintiff's subrogated claim remains in dispute, and additionally in dispute is the exact date plaintiff paid the PIP benefits to its subrogees. Clearly material issues of fact exist in this record which would prevent the granting of the instant Motion for Summary Judgment filed by defendant. As there are material facts still in dispute, viewing the evidence in the light most favorable to the non-moving party, defendant's Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED this 8th day of May, 2006.

John K. Welch
Judge

/jb
cc: Rebecca Dutton, Case Processor
CCP, Civil Division